

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

JOSE AGUSTO,

Plaintiff,

v.

MGM RESORTS,

Defendant.

3:19-cv-00604-MMD-CLB

**REPORT AND RECOMMENDATION
OF U.S. MAGISTRATE JUDGE¹**

Before the Court is Plaintiff Jose Augusto's ("Agusto"), application to proceed *in forma pauperis* (ECF No. 1), his amended application to proceed *in forma pauperis* (ECF No. 7), and his *pro se* civil rights complaint (ECF No. 1-1). For the reasons stated below, the Court recommends that Agusto's *in forma pauperis* application (ECF No. 1) be denied as moot, his amended application to proceed *in forma pauperis* (ECF No. 7) granted, and his complaint (ECF No. 1-1) be dismissed, with prejudice, as to the § 1983 claims, and dismissed, without prejudice, as to the state law claims.

I. *IN FORMA PAUPERIS* APPLICATION

A person may be granted permission to proceed *in forma pauperis* ("IFP") if the person "submits an affidavit that includes a statement of all assets such [person] possesses [and] that the person is unable pay such fees or give security therefore. Such affidavit shall state the nature of the action, defense or appeal and affiant's belief that the person is entitled to redress." 28 U.S.C. § 1915(a)(1); *Lopez v. Smith*, 203 F.3d 1122, 1129 (9th Cir. 2000) (en banc) (stating 28 U.S.C. § 1915 applies to all actions filed IFP, not just prisoner actions).

The Local Rules of Practice for the District of Nevada provide: "Any person who is

¹ This Report and Recommendation is made to the Honorable Miranda M. Du, United States District Judge. The action was referred to the undersigned Magistrate Judge pursuant to 28 U.S.C. § 636(b)(1)(B) and LR IB 1-4.

1 unable to prepay the fees in a civil case may apply to the court for authority to proceed [IFP].
2 The application must be made on the form provided by the court and must include a financial
3 affidavit disclosing the applicant's income, assets, expenses, and liabilities." LSR 1-1.

4 "[T]he supporting affidavit [must] state the facts as to [the] affiant's poverty with some
5 particularity, definiteness and certainty." *U.S. v. McQuade*, 647 F.2d 938, 940 (9th Cir.
6 1981) (quotation marks and citation omitted). A litigant need not "be absolutely destitute to
7 enjoy the benefits of the statute." *Adkins v. E.I. Du Pont de Nemours & Co.*, 335 U.S. 331,
8 339 (1948).

9 A review of the application to proceed IFP reveals Augusto cannot pay the filing fee;
10 therefore, the Court recommends that the application be granted.

11 **II. SCREENING STANDARD**

12 Inmate civil rights complaints are governed by 28 U.S.C. § 1915A. Section 1915A
13 provides, in relevant part, that "the court shall dismiss the case at any time if the court
14 determines that . . . the action or appeal (i) is frivolous or malicious; (ii) fails to state a claim
15 upon which relief may be granted; or (iii) seeks monetary relief against a defendant who is
16 immune from such relief." 28 U.S.C. § 1915A(b). A complaint is frivolous when "it lacks an
17 arguable basis in either law or in fact." *Neitzke v. Williams*, 490 U.S. 319, 325 (1989). This
18 includes claims based on legal conclusions that are untenable (e.g., claims against
19 defendants who are immune from suit or claims of infringement of a legal interest which
20 clearly does not exist), as well as claims based on fanciful factual allegations (e.g.,
21 delusional scenarios). *Id.* at 327–28; *see also McKeever v. Block*, 932 F.2d 795, 798 (9th
22 Cir. 1991). Dismissal for failure to state a claim under § 1915A incorporates the same
23 standard applied in the context of a motion to dismiss under Federal Rule of Civil Procedure
24 12(b)(6), *Wilhelm v. Rotman*, 680 F.3d 1113, 1122 (9th Cir. 2012), which requires dismissal
25 where the complaint fails to "state a claim for relief that is plausible on its face," *Bell Atl.*
26 *Corp. v. Twombly*, 550 U.S. 544, 570 (2007).

27 The complaint is construed in a light most favorable to the plaintiff. *Chubb Custom*

1 *Ins. Co. v. Space Systems/Loral Inc.*, 710 F.3d 946, 956 (9th Cir. 2013). The court must
 2 accept as true all well-pled factual allegations, set aside legal conclusions, and verify that
 3 the factual allegations state a plausible claim for relief. *Ashcroft v. Iqbal*, 556 U.S. 662, 679
 4 (2009). The complaint need not contain detailed factual allegations, but must offer more
 5 than “a formulaic recitation of the elements of a cause of action” and “raise a right to relief
 6 above a speculative level.” *Twombly*, 550 U.S. at 555. Particular care is taken in reviewing
 7 the pleadings of a *pro se* party, for a more forgiving standard applies to litigants not
 8 represented by counsel. *Hebbe v. Pliler*, 627 F.3d 338, 342 (9th Cir. 2010). Still, a liberal
 9 construction may not be used to supply an essential element of the claim not initially pled.
 10 *Pena v. Gardner*, 976 F.2d 469, 471 (9th Cir. 1992). If dismissal is appropriate, a *pro se*
 11 plaintiff should be given leave to amend the complaint and notice of its deficiencies, unless
 12 it is clear that those deficiencies cannot be cured. *Cato v. United States*, 70 F.3d 1103,
 13 1107 (9th Cir. 1995).

14 **III. SCREENING OF COMPLAINT**

15 In his complaint, Augusto sues Defendant MGM Resorts under 42 U.S.C. § 1983 and
 16 Nevada State law. (See ECF No. 1-1.) Augusto alleges the following: On October 1, 2017,
 17 Augusto attended the Route 91 Country Music Festival in Las Vegas, Nevada. (*Id.* at 2.) The
 18 festival was held in an area across the street from the Mandalay Bay Casino, which is owned
 19 by parent company, MGM Resorts. (*Id.*) While attending the festival, Augusto heard gunfire
 20 coming from the Mandalay Bay. (*Id.* at 3.) Augusto tried to help people who were injured
 21 because he knew how to perform CPR. (*Id.*) Augusto was trampled by the crowd, resulting
 22 in a broken jaw, dislocating a disk in his lower back, and serious pain in his neck. (*Id.*)
 23 Augusto went to Sunrise Hospital where he was treated and prescribed Oxycodone for his
 24 pain and injuries. (*Id.*) Augusto continues to take Indomethacin for pain. (*Id.*) Augusto suffered
 25 psychological harm and injury as a result of the incident and was diagnosed with post-
 26 traumatic stress disorder on May 7, 2019. (*Id.*) Augusto takes antidepressant medication to
 27 treat his PTSD. (*Id.*)

1 Agusto asserts that Defendant is liable for “failure to protect” under Nevada personal
2 injury law and Defendant is also liable for negligence under Nevada personal injury law. (*Id.*
3 at 4.) Finally, Agusto alleges Defendant violated his rights under the Seventh Amendment
4 to the United States Constitution. (*Id.*) Agusto seeks a declaration that his rights were
5 violated, compensatory damages in the amount of \$1,750,000, punitive damages in the
6 amount of \$5,000,000, and a jury trial. (*Id.* at 5.)

7 42 U.S.C. § 1983 aims “to deter state actors from using the badge of their authority
8 to deprive individuals of their federally guaranteed rights.” *Anderson v. Warner*, 451 F.3d
9 1063, 1067 (9th Cir. 2006) (quoting *McDade v. West*, 223 F.3d 1135, 1139 (9th Cir. 2000)).
10 The statute “provides a federal cause of action against any person who, acting under color
11 of state law, deprives another of his federal rights[,]” *Conn v. Gabbert*, 526 U.S. 286, 290
12 (1999), and is “merely . . . the procedural device for enforcing substantive provisions of the
13 Constitution and federal statutes.” *Crompton v. Gates*, 947 F.2d 1418, 1420 (9th Cir. 1991).
14 Claims under § 1983 require the plaintiff to allege (1) the violation of a federally-protected
15 right by (2) a person or official who acts under the color of state law. *Anderson*, 451 F.3d at
16 1067.

17 A defendant has acted under color of state law where he or she has “exercised power
18 ‘possessed by virtue of state law and made possible only because the wrongdoer is clothed
19 with the authority of state law.’” *West v. Atkins*, 487 U.S. 42, 49 (1988) (quoting *U.S. v.*
20 *Classic*, 313 U.S. 299, 326 (1941)). Generally, private parties are not acting under color of
21 state law. See *Price v. Hawaii*, 939 F.2d 702, 707–08 (9th Cir. 1991). “A private individual
22 may be liable under § 1983 if she conspired or entered joint action with a state
23 actor.” *Franklin v. Fox*, 312 F.3d 423, 441 (9th Cir.2002). The plaintiff must show “an
24 agreement or meeting of the minds to violate constitutional rights,” and “[t]o be liable, each
25 participant in the conspiracy need not know the exact details of the plan, but each participant
26 must at least share the common objective of the conspiracy.” *Id.* (internal quotation marks
27 omitted).

1 Agusto's only named defendant, MGM Resorts, is a private party. Agusto does not
2 allege that MGM Resorts was acting under the color of state law when his rights were
3 violated or that MGM Resorts conspired or entered joint action with a state actor. Because
4 Agusto is suing a private party and does not assert that they acted under the color of state
5 law, he cannot satisfy each of the required elements for relief under an § 1983 action.
6 Additionally, Agusto alleges that Defendant violated his Seventh Amendment rights.
7 However, the Seventh Amendment relates to right to trial by jury in a civil case. U.S. CONST.
8 amend. VII. Agusto does not provide any allegations to support a claim that he was not
9 afforded a jury trial, and, nevertheless, the Court does not find that Agusto would be able to
10 state such a claim against a private party. Accordingly, the Court finds that Agusto fails to
11 state a colorable claim and therefore his claims under § 1983 should be dismissed, with
12 prejudice, as amendment would be futile.

13 Finally, because Agusto fails to state any colorable federal claims, the Court should
14 decline to exercise supplemental jurisdiction over his negligence and failure to protect
15 claims. See 28 U.S.C. § 1367(a) (stating that "in any civil action of which the district courts
16 have original jurisdiction, the district courts shall have supplemental jurisdiction over all other
17 claims that are so related to claims in the action within such original jurisdiction that they
18 form part of the same case or controversy").

19 **IV. CONCLUSION**

20 For the reasons articulated above, the Court recommends that Agusto's application
21 to proceed *in forma pauperis* (ECF No. 1) be denied as moot, his amended application to
22 proceed *in forma pauperis* (ECF No. 7) be granted, and his complaint (ECF No. 1-1) be
23 dismissed, with prejudice, as to the § 1983 claims, and dismissed, without prejudice, as to
24 the state law claims.

25 The parties are advised:

26 1. Pursuant to 28 U.S.C. § 636(b)(1)(c) and Rule IB 3-2 of the Local Rules of
27 Practice, the parties may file specific written objections to this Report and Recommendation

1 within fourteen days of receipt. These objections should be entitled "Objections to
2 Magistrate Judge's Report and Recommendation" and should be accompanied by points
3 and authorities for consideration by the District Court.

4 2. This Report and Recommendation is not an appealable order and any notice
5 of appeal pursuant to Fed. R. App. P. 4(a)(1) should not be filed until entry of the District
6 Court's judgment.

7 **V. RECOMMENDATION**

8 **IT IS THEREFORE RECOMMENDED** that Augusto's application to proceed *in forma*
9 *pauperis* (ECF No. 1) be **DENIED AS MOOT** and his amended application to proceed *in*
10 *forma pauperis* (ECF No. 7) **GRANTED**;

11 **IT IS FURTHER RECOMMENDED** that the Clerk **FILE** Augusto's complaint (ECF No.
12 1-1); and

13 **IT IS FURTHER RECOMMENDED** that Augusto's complaint (ECF No. 1-1) be
14 **DISMISSED**, with prejudice, as to the § 1983 claims, and **DISMISSED**, without prejudice,
15 as to the state law claims.

16 **DATED:** December 23, 2019.

17 
18 **UNITED STATES MAGISTRATE JUDGE**